IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3509 OF 2006

1. N.R.C. Limited
Formerly known as National
Rayon Corporation Limited,
a company registered under
the Companuies Act, 1910
having its Registered office
at Ewart House, Homi Mody
Street, Fort, Mumbai 400 001

2. Abraham Kolathu Joseph
having his office at Ewart
House, Homi Mody Street,
Mumbai-400 001. .. Petitioners.

Versus

1. Union of India.

2. The Assistant Commissioner
of Central Excise, Kalyan III
Division, having his office at
Dnyaneshwar Prasad Building,
1st Floor, Murbad Road,
Kalyan (W).

3. The Superintendent of Central
Excise, Rage-I, Kalyan Division
having his office at
Dnyaneshwar Prasad Building,
1st Floor, Murbad Road,
Kalyan (W). .. Respondents.

Mr.N.A. Modi, Advocate with L.R. Ruben with Sujit Suryawanshi i/b. M/s. Vigil Juris for the petitioners.

Mr.R.V.Desai, senior advocate with Y.R.Mishra for the respondents.

CORAM : H.L. GOKHALE & J.P. DEVADHAR, JJ.

JUDGMENT RESERVED ON : 28TH SEPTEMBER, 2006.

JUDGMENT PRONONOUNCED ON : 19TH OCTOBER, 2006.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. Heard. Rule. Rule made returnable forthwith. By consent of parties, the writ petition is taken up for final hearing.

2. This petition is filed to challenge the four demand notices issued by the revenue in April / May, 2006 (Exhibit 'A1' to 'A4') only to the extent the said notices seek to demand interest at the rate of 12% per annum on the additional duty (countervailing duty) payable on the caprolactum imported and cleared by the petitioners during the period from March, 1986 to July, 1991. The interest demand is based on the interim order passed by this Court on 2nd May, 1986 in Writ Petition No.1174 of 1986. The case of the petitioners is that, firstly, in the final order passed by the Court the duty is not ordered to be paid with interest and hence interest cannot be demanded based on the interim order and secondly, the interest demanded by the impugned notices without issuing a show cause notice within the stipulated time is bad in law and, therefore, the impugned demand notices are liable to be quashed and set aside.

3. The petitioners are engaged in the manufacture of Nylon Tyre Cord Fabric. The petitioners have been

importing caprolactum which is a raw material required in the manufacture of Nylon Tyre Cord Fabric.

4. As the Customs Authorities sought to impose the additional customs duty (countervailing duty) under the Customs Tariff Act, 1975 on the imported caprolactum, the petitioners filed Writ Petition No.1174 of 1986 in this Court to challenge the constitutional validity of Section 3(2) of the Customs Tariff Act, 1975 as also the levy of additional duty on the caprolactum imported by the petitioners. The said Writ Petition was admitted on 2nd May, 1986 and by way of interim relief, the petitioners were permitted to clear the imported caprolactum on furnishing a bank guarantee towards the disputed amount of countervailing duty. The said order was to apply in respect of the caprolactum already imported and also to be imported by the petitioners. Accordingly, the caprolactum imported by the petitioners during the period from March, 1986 to May 1991 has been cleared from time-to-time by filing in all 939 bills of entry and on furnishing bank guarantees aggregating to Rs.6.50 crores.

5. The above Writ Petition No.1174 of 1986 was ultimately dismissed on 28th June, 1994 as the issues raised in the petition were covered against the petitioners by the decision of this Court in the case of

Ashok Traders V/s. Union of India reported in **32 E.L.T. 262**. Thus, by the said order dated 28th June, 1994, the liability to pay additional duty on the caprolactum imported and cleared during the period from 1986 to 1991 was upheld. While dismissing the writ petition on 28th June, 1994, the Court had continued the interim order passed on 2nd May, 1986 for 10 weeks. The said order is silent regarding the liability to pay duty or the interest.

6. Being aggrieved by the order dated 28th June, 1994, the petitioners filed a Civil Appeal bearing No.5974 of 1994 before the Apex Court. The Apex Court by its order dated 14th November, 1994 permitted the revenue to encash the bank guarantees to the extent of Rs.3.25 crores and directed the petitioners to keep the bank guarantees alive for the balance amount till the disposal of the appeal. The Apex Court further observed that in the event of the appeal being allowed, the revenue shall refund the amount with interest at the rate of 12% per annum. The petitioners by their letter dated 15th December, 1994 offered to pay Rs.3.25 crores instead of the revenue encashing the bank guarantees. Accordingly, during the period from 20th February, 1995 to 9th March, 1995 the petitioners have paid a sum of Rs.3,25,40,000/- to the revenue and the bank guarantees for the balance amount of Rs.3.25 crores were kept

alive.

7. While the said Civil Appeal was pending before the Apex Court, the Central Government introduced Kar Vivad Samadhan Scheme, 1998 ('KVSS 1998' for short) under which the tax-payers were entitled to file a declaration in respect of the tax arrears determined on or before 31st March, 1998, but had remained unpaid on the date of declaration. With a view to avail the benefit under the KVSS 1998, the petitioners filed a declaration, but the same was rejected on 1st March, 1999. The petitioners challenged the said order by filing a Writ Petition No.2528 of 1999 in this Court. During the pendency of the said writ petition, the petitioners sought to withdraw the Civil Appeal No.5974 of 1994 pending before the Apex Court. In view of the pendency of the writ petition No.2528 of 1999, the Apex Court by its order dated 29th September, 1999 dismissed the said Civil Appeal as withdrawn.

8. Thereafter, the Writ petition No.2528 of 1999 was heard and by an order dated 18th January, 2000 the order dated 1st March, 1990 was set aside and the matter was remanded back. The Commissioner, Central Excise - III once again heard the application made under KVSS, 1998 and by an order dated 14th June, 2001 rejected the declaration filed by the petitioners under the KVSS,

1998.

9. Challenging the order dated 14th June, 2001, the petitioners filed Writ Petition No.2135 of 2001 in this Court. While admitting the said petition on 3rd October, 2001, this Court permitted the revenue to encash the bank guarantees to the extent of 50% and directed the petitioners to keep the bank guarantees for the balance amount alive till the disposal of the petition. Accordingly, the revenue has encashed the bank guarantees to the extent of Rs.1,54,73,189/- and the bank guarantees for the balance amount have been kept alive. The said Writ petition was ultimately dismissed on 31st March, 2006, thereby confirming the stand of the revenue that the benefit of KVSS, 1998 was not available to the petitioners.

10. Thereafter, by the four notices dated 17th April, 2006, 18th April, 2006 and two notices both dated 3rd May, 2006 which are impugned in this petition, the Assistant Commissioner of Central Excise - III called upon the petitioners to pay the balance duty amounting Rs.1,54,73,890/- along with interest at the rate of 12% as per the interim order of this Court passed in Writ Petition No.1174 of 1986 on 2nd May, 1986. In the notice dated 3rd May, 2006, the interest payable as on 30th April, 2006 was quantified at Rs.7,72,88,465/-.

However, in the affidavit in reply it is stated that the interest payable as on 31st March, 2006 is Rs.7,79,90,927/-. The present petition is filed to challenge the aforesaid four notices issued by the revenue. This Court while granting interim relief on 19th May, 2006 directed the petitioners to deposit Rs.1,54,73,890/- towards the balance duty payable on the caprolactum imported and cleared by the petitioners. Accordingly, the petitioners have deposited a sum of Rs.1,54,73,890/- in this Court.

11. To complete the narration of facts, it may be noted that the caprolactum imported during March, 1986 to May, 1991 and cleared pursuant to the order dated 2nd May, 1986 vide 939 bills of entry have been assessed by an order in original dated 7th December, 2004. By the said assessment order, the additional duty payable by the petitioners on the caprolactum imported and cleared during 1986 to 1991 was quantified at Rs.6,34,87,079/-. After giving credit to the amount of Rs.4,80,13,189/- already paid (Rs.3,25,40,000/- paid as per the order passed by the Apex Court and Rs.1,54,73,189/- paid as per order of this Court passed in Writ Petition No..2135 of 2001 on 3rd October, 2001), the petitioners were called upon to pay balance amount of Rs.1,54,73,890/- along with interest at the rate of 12% per annum. By a letter dated 7th January, 2005, the revenue called upon

the petitioners to pay the duty demand confirmed by the order in original dated 7th December, 2004 along with interest at the rate of 12% per annum. We are informed that the appeal filed against the said order has been dismissed by the appellate authority and further appeal filed by the petitioners is pending before the CESTAT.

12. Mr.Modi, learned advocate appearing on behalf of the petitioners submitted that the impugned demand notices in so far they purport to demand interest based on the interim order passed on 2nd May, 1986 in Writ Petition No.1174 of 1986 is wholly unsustainable in law, because, in the final order passed in Writ Petition No.1174 of 1986 on 28th June, 1994, this Court has not ordered that the duty be paid with interest. Even in the further Appeal filed by the petitioners, the Apex Court has not passed any order for payment of duty with interest. Since the interim order merges in the final order, unless, the Court in its final order directs payment of duty with interest, it is not open to the revenue to issue demand notices seeking recovery of duty with interest based on the interim order passed on 2nd May, 1986.

13. Relying upon the decisions of the Apex Court in the case of **Shipping Corporation of India Ltd. V/s. Machado Brothers & Others. (2004) 11 Supreme Court**

Cases 168, **Jaipur Municipal Corporation V/s. C.L. Mishra** reported in **(2005) 8 Supreme Court Cases 423** and **Gurswarup Joshi V/s. Beena Sharma & Others** reported in **(2006) 5 Supreme Court Cases 119**, Mr. Modi submitted that an interlocutory order passed in a writ petition does not survive after the original proceedings come to an end, because, the interim order merges into the final order. In the present case, the final order passed in Writ Petition No.1174 of 1986 on 28th June, 1994 does not require the petitioners to pay duty with interest and, therefore, it is not open to the respondents to demand duty with interest based on the interim order passed in Writ Petition No.1174 of 1986 on 2nd May, 1986.

14. Mr.Modi further submitted that under the Customs Act, 1962, it is mandatory on the part of the revenue to issue a show cause notice before demanding any duty or interest. In the present case, admittedly notice under Section 28 or any other section of the Customs Act has not been issued to the petitioners. Thus, the demand for interest made in the impugned notices without issuing a show cause notice under any of the provisions of the Customs Act, 1962 is totally illegal and contrary to law. Mr.Modi further submitted that the demand for interest under the impugned notices is mutually contradictory, because in the first notice interest at

the rate of 12% per annum is demanded on Rs.1,54,73,890/-, whereas in the notice dated 3rd May, 2006 the respondents have computed interest payable at Rs.7,72,88,465/- as on 30th April, 2006 and in the affidavit in reply, the respondents have computed interest payable at Rs.7,79,90,927/- as on 31st March, 2006. Thus, the respondents themselves are not clear as to the exact amount of interest that is allegedly payable and, therefore, the impugned notices issued without a show cause notice are liable to be quashed and set aside.

15. Mr.Modi further submitted that assuming that the respondents are entitled to claim interest in terms of the interim order dated 2nd May, 1986, the impugned notices issued in the month of April / May, 2006 are hopelessly time-barred. If the respondents had issued a show cause notice, the petitioners would have demonstrated that the claim for interest based on the order dated 2nd May, 1986 is not maintainable in view of the final order dated 28th June, 1994 and further established that the impugned demand notices issued beyond the time prescribed under the Act are time-barred and that the demand raised without a show cause notice and without giving an opportunity of hearing are in gross violation of the principles of natural justice. Accordingly, Mr.Modi submitted that the impugned notices

are liable to be quashed and set aside.

16. Mr.Desai, learned senior advocate appearing on behalf of the respondents, on the other hand, submitted that the interest can be claimed under the statute or under a contract or on the principles of equity. He submitted that in the present case, the goods imported by the petitioners were permitted clearance without payment of additional customs duty during the period from 1986 to 1991 pursuant to the interim order passed by this Court on 2nd May, 1986 in Writ Petition No.1174 of 1986. He submitted that while granting the interim relief, this Court had categorically stated that in the event the revenue succeeds, the petitioners shall pay interest on the disputed amount at the rate of 12% per annum. Admittedly, the revenue has succeeded in the matter as the Writ Petition No.1174 of 1986 filed by the petitioners has been dismissed on 28th June, 1994. Even, the Civil Appeal filed before the Apex Court against the order dated 28th June, 1994 has been withdrawn by the petitioners on 29th September, 1999 in view of the proceedings pending under KVSS, 1998. This court, by dismissing writ petition No.2135 of 2001 on 31st March, 2001 has held that the petitioners are not entitled to the benefit under KVSS, 1998. In these circumstances, the revenue is justified in issuing the impugned notices in April / May, 2006 demanding the duty

with interest at the rate of 12% per annum as per the interim order dated 2nd May, 1986.

17. Mr.Desai further submitted that the demand for interest contained in the impugned notices cannot be said to be time-barred, because, the writ petition No.1174 of 1986 was dismissed on 28th June, 1994, Civil Appeal filed before the Apex Court against the said order was ultimately withdrawn on 29th September, 1999 in view of the pending proceedings under KVSS, 1998. On 31st March, 2006 the writ petition No.2135 of 2001 filed by the petitioners seeking benefit under KVSS, 1998 has been dismissed. In these circumstances, the demand notices issued in April / May, 2006 cannot be said to be time-barred.

18. Relying upon the Judgment of the Apex Court in the case of **South Eastern Coalfields Ltd. V/s. State of Madhya Pradesh and Others.** reported in **(2003) 8 Supreme Court Cases 648** and **Calcutta Jute Manufacturing Company V/s. Commercial Tax Officer** reported in **1997 (93) E.L.T. 657 (S.C.)**, Mr. Desai submitted that the obligation to pay interest in equity can arise in certain circumstances even in the absence of an agreement or custom or statutory provisions of the Act. Mr.Desai placed strong reliance on the following observations of the Apex Court Judgment in the case of

South Eastern Coalfields Limited (Supra) which reads thus :

> "Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement [see Chitty on Contracts, 1999 Edn., Vol II, Part 38-248, at P.712]. Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.
>
> The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted

> by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed. "

Accordingly, Mr.Desai submitted that the petitioners who had obtained clearance of the goods imported during the period from March, 1986 to May, 1991 without payment of additional duty subject to the condition that if the revenue ultimately succeeds, the duty would be paid with interest at the rate of 12% per annum, cannot now contend even after loosing at every stage of the litigation that the duty with interest is not payable.

19. With reference to the decisions relied upon by the counsel for the petitioners, Mr.Desai submitted that the said decisions do not have any bearing on the issues involved in the present petition, because, in the present case, the clearance of the goods was subject to the condition that in the event of the revenue succeeding in the matter, the petitioners shall pay duty with interest at the rate of 12% per annum. Accordingly, Mr.Desai submitted that the impugned demand notices are neither time-barred nor the said notices suffer from any infirmity and, therefore, the petitioners are not entitled to any relief in the present petition.

20. We have carefully considered the rival submissions as also various decisions cited before us.

21. At the outset, it may be noted that the additional duty (countervailing duty) payable in respect of the caprolactum imported and cleared during the period from 1986 to 1991 which is quantified at Rs.6,34,87,079/- by the order in original dated 7th December, 2004 is not disputed by the petitioners. By the said order, after giving credit to the amount of Rs.4,80,13,189/- already paid, the balance amount of additional duty payable was determined at Rs.1,54,73,890/-. The said amount of Rs.1,54,73,890/- has been deposited by the petitioners in this Court as per the order passed in this writ petition on 19th May, 2006. The petitioners cannot and in fact do not have any objection if the said amount is paid over to the respondents in full discharge of their duty liability.

22. The only question, therefore, to be considered in this petition is, whether the revenue is justified in demanding duty with interest at the rate of 12% per annum as per the interim order dated 2nd May, 1986. By the impugned notice dated 17th April, 2006, the revenue has demanded balance duty of Rs.1,54,73,890/- along with interest at the rate of 12% per annum. By the impugned

notice dated 3rd May, 2006 the revenue has quantified the interest at Rs.7,72,88,465/- calculated at the rate of 12% per annum on the delayed payment of duty from the date of clearance till the date of payment of duty upto 30th April, 2006. In the affidavit in reply to the petition filed on 22nd June, 2006, the revenue has corrected the above figures by stating that the interest payable on the delayed payment of duty at the rate of 12% upto 31st March, 2006 works out to Rs.7,79,90,927/-. Thus, the question to be decided in this petition is, whether the revenue is justified in issuing the impugned notices in April / May, 2006 demanding interest quantified at Rs.7,79,90,927/- calculated at the rate of 12% per annum on the delayed payment of duty from the date of clearance till 31st March, 2006 based on the basis of the interim order passed in writ petition No.1174 of 1986 on 2nd May, 1986.

23. Although several arguments have been advanced by the counsel on both sides, in our opinion, the basic issue is, having confirmed the duty demand with interest at the rate of 12% per annum from the date of clearance of the goods till payment by an the order in original dated 7th December, 2004, is it open to the revenue to issue the impugned demand notices claiming interest at the rate of 12% per annum based on the interim order passed in writ petition No.1174 of 1986 on 2nd May,

1986? In other words, the question is, once the revenue has confirmed the demand for interest at the rate of 12% per annum on the delayed payment of duty from the date of clearance till payment, is it open to the revenue to claim interest once again at the rate of 12% per annum on the delayed payment of duty on the basis of interim order passed in writ petition No.1174 of 1986 on 2nd May, 1986.

24. We called upon Mr.Desai, learned counsel for the revenue to clarify as to whether the interest demand raised in the impugned notices are in implementation of the order in original dated 7th December, 2004, or independent of the said order dated 7th December, 2004. Mr.Desai fairly stated that the duty and interest claimed in the impugned notices are relatable to the duty and interest confirmed in the order in original dated 7th December, 2004, however, he submitted that irrespective of the demand for duty and interest confirmed by the order dated 7th December, 2004, the revenue is entitled to demand interest in equity, because, in the present case, by an order dated 2nd May, 1986, the goods were allowed clearance without payment of duty, but, subject to the condition that if ultimately held that the duty is payable, then the same shall be paid with interest at the rate of 12% per annum. Admittedly, the duty is payable and, therefore,

as per the order dated 2nd May, 1986 the petitioners are liable to pay duty with interest at the rate of 12% per annum.

25. In our opinion, the argument of the revenue is wholly misconceived. The liability to pay interest on the delayed payment of duty may arise in different ways. But once the interest is confirmed on the delayed payment of duty, the revenue cannot demand interest for the same period once again, based on some other ground. To do so would mean claiming interest twice for the delayed payment of duty which is not permissible in law. In the present case by an order dated 7th December, 2004, the revenue has already imposed interest liability at the rate of 12% per annum on the duty payable on caprolactum from the date of its clearance till payment. Therefore, the impugned notices which seeks to demand interest at the rate of 12% per annum once again even after the order dated 7th December, 2004 cannot be sustained.

26. Apart from that, to claim interest dehorse the assessment order, it is mandatory under Section 28 of the Customs Act to issue a show cause notice before demanding the interest. In the present case, admittedly, the show cause notice has not been issued before issuing the impugned demand notices. Therefore,

the impugned demand notices issued without a show cause notice and without giving personal hearing are in violation of the principles of natural justice and hence liable to be quashed and set aside.

27. Once we hold that the impugned demand notices are unsustainable in law on the grounds set out hereinabove, it is not necessary for us to consider other arguments advanced on behalf of the petitioners. In other words, once it is held that the impugned notices are bad in law, it is not necessary to go into the question as to whether the interest at the rate of 12% per annum could be demanded based on interim order dated 2nd May, 1986. Though Section 28AA has been introduced in the Customs Act, 1962 with effect from 26th May, 1995, by order in original dated 7th December, 2004 interest at the rate of 12% per annum has been confirmed on the delayed payment of duty from the date of clearance of goods during the period from 1986 to 1991 till payment. Whether the interest at the rate of 12% per annum confirmed for the period prior to the insertion of Section 28AA i.e. from 1986 to 25th May, 1995 is based on the interim order dated 2nd May, 1986 or not is a question which can be gone into while considering the validity of the order dated 7th December, 2004. Validity of the order in original is not the subject matter of the present petition and

admittedly the validity of the said order is pending before the CESTAT and it will be open to the petitioners to agitate all these contentions before the CESTAT.

28. However, we make it clear that we are not expressing any opinion regarding the interest liability confirmed by the order in original dated 7th December, 2004. It will be open to the Tribunal to enquire as to whether the interest liability confirmed by order in original dated 7th December, 2004 is based on the interim order dated 2nd May, 1986 or otherwise and if so, whether the same is justified. The CESTAT before whom the validity of the order in original dated 7th December, 2004 is pending, shall decide the matter on its own merits without being influenced by our order passed in this petition. Since the demand for interest confirmed by order in original dated 7th December, 2004 has not been enforced so far, we direct that the bank guarantees furnished by the petitioners shall not be enforced for a period of 8 weeks from today so as to enable the petitioners to seek appropriate relief from the CESTAT in that behalf. All contentions of both parties are kept open.

29. In the result, we pass the following order :

a) The notices dated 17th April, 2006, 18th

April, 2006, 3rd May, 2006 and 3rd May, 2006 (Exhibit ‘A1’, ‘A2’, ‘A3’ and ‘A4’ respectively) to the extent they seek to demand interest on delayed payment of duty are quashed and set aside.

b) The revenue is at liberty to withdraw the amount of Rs.1,54,73,890/- deposited by the petitioners in Court together with accrued interest, if any, towards the balance amount of additional duty payable in respect of the caprolactum imported and cleared during the period from 1986 to 1991.

c) The bank guarantees, furnished by the petitioners, shall not be encashed by the revenue in implementation of the order dated 7th December, 2004 for a period of eight weeks from today.

30. The petition is disposed off in the above terms with no order as to costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)